UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABOR PLUS, LLC, AND ITS SUCCESSOR
WYNN LAS VEGAS, LLC

and Case No. 28-CA-161779

LABOR PLUS, LLC

and Case No. 28-CA-166890

WYNN LAS VEGAS, LLC

and

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
AND MOVING PICTURE TECHNICIANS,
ARTISTS AND ALLIED CRAFTS OF THE
UNITED STATES AND CANADA
LOCAL UNION 720 (IATSE)
_____/

RESPONDENT WYNN LAS VEGAS, LLC'S ANSWERING BRIEF TO THE CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. STATEMENT OF THE CASE.

This case presented the improper attempt to foist a collective bargaining obligation on Respondent Wynn Las Vegas, LLC ("Wynn") despite a number of violations to Wynn's due process rights[1] and the complete absence of any legally cognizable obligation for Wynn to collectively bargain with the I.A.T.S.E. Local 720 ("the Union") on behalf of the asserted unit of employees. Specifically, on May 2, 2015, Region 28 conducted a representation election for a unit of stagehand employees employed by Labor Plus, LLC – a labor provider – in the ShowStoppers Theater of Wynn. Both the Union and the Region failed to ever provide notice of the representation election or to allow Wynn's participation in the same. The Petition for Election, Stipulated Election Agreement, and Certification of Representative all failed to identify Wynn as an employer and solely named Labor Plus as the employer of the employees in question. Wynn was never provided official notice of the election or allowed to participate in the same with its own ShowStoppers (Encore) Theater stage technicians who had never worked for Labor Plus. Then, after knowingly impairing Wynn's rights, the Union hoped to coercively impose a collectively bargaining obligation on Wynn as a successor employer despite the fact that Wynn never hired a majority of stagehand technicians from Labor Plus.

Administrative Law Judge John T. Giannopoulos conducted a hearing on this matter in Las Vegas, Nevada on November 3, 2016. Gregory J. Kamer, Esq. and R. Todd Creer, Esq. of the law firm of Kamer Zucker Abbott represented Wynn. Larry A. "Tony" Smith, Esq. served as Counsel for the General Counsel of the Board. Caren P. Sencer, Esq. represented the Union. On motion by Mr. Smith, the Consolidated Complaint was successfully amended during the hearing

[1]The failure of the Administrative Law Judge to analyze the violations of Wynn's due process rights as a separate basis for dismissing the Complaint is addressed in Wynn's Cross-Exception and Brief in Support of Cross-Exception filed concurrently with this Answering Brief.

to dismiss Labor Plus as a Respondent, as well as the corresponding unfair labor practice charges. Transcript at 12:8-25; 13:1-25; 14:1-25; 15:1-25; 16:1-25; 17:1-4; **GC Ex. 1(v)**.

Ultimately, the evidence presented at trial clearly demonstrated that the contrived successor employer bargaining obligation asserted by General Counsel and the Union is legally deficient. Wynn did not wholly transfer all the Labor Plus stagehands into its own workforce. Instead, once it terminated the service agreement with Labor Plus, Wynn allowed Labor Plus stagehands to apply for open stage technicians positions at Wynn, to proceed through Wynn's background check and drug testing procedures, and, if hired, to become subject to the terms and conditions of employment set by Wynn. Notably, not all of the former Labor Plus stagehands applied to work with Wynn. Moreover, Wynn did not hire all of the Labor Plus stagehands who applied for open positions. In fact, Wynn posted the open stage technicians positions on its website and hired a number of employees who were never associated with Labor Plus. Most importantly, Wynn **never** maintained a majority of Labor Plus stagehands in its employee complement and, as a result, never became a successor to Labor Plus.

During the hearing, the Board called the following individuals as witnesses: Rita Taratko, Office Manager for Labor Plus; Monica-Marie Coakley, Assistant Director of Technical Operations for Wynn; and Eric Fouts, a Lead Carpenter in the Encore Theater. Additionally, the parties submitted an extensive factual stipulation as Joint Exhibit 20. One volume of transcript containing the testimony presented during the hearing was prepared and transmitted to the parties on or about November 11, 2016. References in this brief to the transcript are to the party testifying, the page of testimony in the transcript, and the relevant transcript lines referenced (*e.g.*, Fouts 140:1-4). There are also references to General Counsel Exhibits (GC Ex.), Joint Exhibits (Jt. Ex.), and Administrative Law Judge Exhibits (ALJ Ex.).

II. FACTUAL BACKGROUND.

A. Wynn's Encore Theater Stage Technicians.

In late 2014, Wynn opened a new show in its Encore Theater called "ShowStoppers." Coakley 86:2-7; 87:16-18. The ShowStoppers production is a musical review of the best of America's classic songbooks, including everything from *Hello, Dolly!*, to *Chicago*, and *New York, New York.* Id. Wynn employed a number of its own stage technicians[2] to work on the ShowStoppers production, including Monica-Marie Coakley, Assistant Director of Technical Operations for Wynn, and full-time stage technicians Lynsey Oliver, Ben Clark, and Gregory Bober. Fouts 137:22-25; 138:1-4; **Jt. Ex. 20** at ¶ 24.

In addition to its own stage technicians, Wynn contracted with Labor Plus on or about November 17, 2014 to provide additional stagehands for the ShowStoppers production. **Jt. Ex. 1** at ¶ 1; **Jt. Ex. 20**. The Agreement for Services between Wynn and Labor Plus could be terminated at any time by mutual consent of the parties. **Jt. Ex. 1** at ¶ 4(B). The stagehands Labor Plus provided to Wynn consisted of both full-time and steady extra stagehands, including Jonathan Contini, Brian Pomeroy, William Stephenson, Eric Fouts, Hector Lugo, Eric Meyers, Bret Portzer, Kendall Zobrist, Heather Lewis, Luke Cresson, Debbie Jensen-Miller, Eric Schafer, James Herlihy, Trent Utterback, Collin Barnes, Timothy Karlsen, Josh Perrill, Doug Tate, Sr., David Weigant, John Gable, and Christopher Portzer. **Jt. Ex. 20** at ¶ 2. Thus, between Wynn and Labor Plus, the total number of stagehands and stage technicians not including Ms. Coakley was twenty-four – seventeen full-time stagehands and seven steady extra stagehands. **Jt. Ex. 20** at ¶¶ 2, 24. Labor Plus provided Wynn with stagehands from November 2014 through May 9, 2015. **Jt. Ex. 6**; **Jt. Ex. 20** at ¶ 8.

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[2]Wynn classifies its employees as "stage technicians," while other entities often use the term "stagehands." Coakley 104:8-17.

Due to the success of the ShowStoppers production, Wynn made the decision to hire an internal crew of stage technicians. **Jt. Ex. 3**. Accordingly, on April 17, 2015, Wynn notified Labor Plus that it would no longer be using its services and that it planned to hire its own stage technicians directly. **Jt. Ex. 3**; **Jt. Ex. 20** at ¶ 4. Wynn also informed the Labor Plus stagehands who were working on the ShowStoppers production that they were welcome to apply for positions with Wynn directly if they were interested. Coakley 91:10-12; Fouts 127:12-19; **Jt. Ex. 3**. Wynn posted the available stage technician positions on its website. Coakley 116:15-22. Shortly thereafter, Wynn began accepting applications for the stage technician positions. Several Labor Plus stagehands applied for employment with Wynn. **Jt. Ex. 20** at ¶¶ 25-29, 32. Notably, the former Labor Plus stagehands who were interested in working for Wynn were required to proceed through Wynn's regular hiring process along with all of the other applicants. Coakley 92:8-10; Fouts 138:10-25. Wynn's hiring process takes approximately one to four weeks to complete. Coakley 91:23-25; 92:1.

Not all of the Labor Plus stagehands that applied to work for Wynn were hired. Coakley 92:14-16; Fouts 140:1-4. Some of the Labor Plus stagehands who applied to work for Wynn did not pass Wynn's background check or drug test. Coakley 115:25; 116:1-14. Other Labor Plus stagehands did not even apply to work for Wynn. Coakley 116:5. Additionally, Wynn filled some of the stage technician positions with applicants from sources other than Labor Plus. Coakley 116:15-22. All of the stage technicians hired by Wynn, regardless of whether or not they were formerly affiliated with Labor Plus, are subject to Wynn's policies and procedures, are paid by Wynn, and also receive Wynn's benefits, such as a 401(k) plan and health insurance. Coakley 120:22-25; 121:1-2; Fouts 132:15-25; 133:1-5; 141:21-25; 142:1-3.

As set forth below in more detail, while Wynn eventually hired some stagehands who

formerly worked for Labor Plus, Wynn hired many of those individuals *prior* to the May 2, 2015 representation election. **Jt. Ex. 20** at ¶¶ 7, 20 25. Wynn hired the other former Labor Plus stagehands from May 5, 2015 to June 16, 2015 – well before the Certification of Bargaining Representative was ever issued on December 1, 2015. **Jt. Ex. 15**; **Jt. Ex. 20** at ¶¶ 7, 20 25. Moreover, many of Wynn's other stage technicians for the ShowStoppers production were already employees of Wynn or never affiliated with Labor Plus. **Jt. Ex. 20** at ¶¶ 24, 30, 31, 33-42.

B. The Representation Election Between the Union and Labor Plus.

On April 15, 2015, the Union filed a representation petition with the Board seeking to represent "all full-time and regular part-time on-call stagehand employees in the Wynn ShowStoppers Theater in Las Vegas, Nevada." **Jt. Ex. 2**; **Jt. Ex. 20** at ¶ 3. The petition named Labor Plus as the sole employer of such employees. **Jt. Ex. 2**. Significantly, neither Region 28 nor the Union ever named or otherwise identified Wynn as an employer of the petitioned-for unit, including in the Stipulated Election Agreement. Id.; **Jt. Ex. 5**; **Jt. Ex. 20** at ¶ 5. Moreover, Labor Plus did not discuss the existence of the election petition with Wynn prior to the election. Taratko 57:1-3, 20-23. In fact, Ms. Coakley did not even learn of the petition until after the May 2, 2015 election occurred. Coakley 90:10-17; 120:10-17.

On April 28, 2015, Labor Plus submitted a voter list of all eligible voters, which included nineteen unit employees and two additional employees subject to challenge on the basis that they were casual employees. **Jt. Ex. 5**; **Jt. Ex. 20** at ¶ 6. Subsequently, on May 2, 2015, the Board conducted the representation election between Labor Plus and the Union. **Jt. Ex. 20** at ¶ 7. Sixteen ballots were cast in the election, all of which were challenged by Labor Plus. Id. Thereafter, on May 11, 2015, Labor Plus submitted a number of objections to the election. Id. at

¶ 9. Accordingly, no ballots were opened and no certification of election issued at the time of the election. Labor Plus's objections and challenges then proceeded through a number of hearings and appeals. **Jt. Exs. 7-10, 14**; **Jt. Ex. 20** at ¶¶ 10-11, 14, 16-19.

On June 17, 2015, a hearing officer issued a post-election report sustaining Labor Plus's challenges to three ballots and overruling Labor Plus's election objections. **Jt. Ex. 11**; **Jt. Ex. 20** at ¶ 11. Specifically, the hearing officer sustained the three challenged ballots of James Herlihy, William Stephenson, and Heather Lewis on the basis that those employees were ineligible to vote as they were already hired by Wynn prior to the May 2, 2015 election. **Jt. Ex. 11** at 13-15. With regard to the other two employees hired by Wynn on May 1, 2015 – David Weigant and Jonathan Contini – the hearing officer noted that Mr. Contini did not vote in the representation election and that there was insufficient evidence presented to make a determination on whether Mr. Weigant was no longer employed by Labor Plus as of May 2, 2015.[3] Id. at 13, n.8; 16-17.

Subsequently, on August 10, 2015, the Regional Director issued a decision on the challenges and objections based on the hearing officer's report and agreed with the hearing officer's recommendations to sustain Labor Plus's challenges to the ballots of Mr. Herlihy, Mr. Stephenson, and Ms. Lewis. **Jt. Ex. 14** at 10; **Jt. Ex. 20** at ¶ 16. On August 24, 2015, Labor Plus filed a Request for Review of the Regional Director's decision; however, the Board declined to review the Regional Director's decision, and the Board issued an order on November 9, 2015 directing the opening and counting of the ballots. **Jt. Ex. 20** at ¶¶ 17, 19. Ultimately, on December 1, 2015, the Regional Director issued a Certificate of Representative certifying the Union as the exclusive collective-bargaining representative of a unit of full-time and regular part-time employees in the Wynn ShowStoppers Theater. **Jt. Ex. 15**; **Jt. Ex. 20** at ¶ 20.

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[3]In the present matter, however, the parties stipulated that Mr. Weigant was in fact hired by Wynn on May 1, 2015. **Jt. Ex. 20** at ¶ 25.

C. Facts Specific to Stage Technician David Weigant.

As noted *supra*, Labor Plus challenged the ballot of David Weigant along with all of the other Labor Plus employees who voted in the representation election. **Jt. Ex. 20** at ¶¶ 7, 9. During the hearing on Labor Plus's objections, Ms. Taratko testified that Labor Plus was notified on April 30 or May 1, 2015 (before the representation election) that Wynn had officially hired five employees, including Mr. Weigant. **Jt. Ex. 7** at 70:10-21. The documentary evidence presented at the objection hearing in the form of timesheets did not include Mr. Weigant, most likely because he was a swing employee who only worked as needed; however, Mr. Taratko once again confirmed that Mr. Weigant, along with the others, was not referred to the Wynn Encore Theater past May 2, 2015. Id. at 138:5-23.

When ruling on Mr. Weigant's ballot, the hearing officer noted that, "It is unclear whether Weigant was not on the timesheets because he was not needed on those dates or because the Employer [Labor Plus] was no longer referring him to the theater due to the Wynn having hired him or due to some other reason." **Jt. Ex. 11** at 16. Thus, the hearing office felt that Ms. Taratko's testimony was too unreliable to be credited and allowed Mr. Weigant's ballot to be counted in the representation election. Id. The Regional Director affirmed that reasoning. See **Jt. Ex. 14** at 10. On the other hand, both the hearing officer and Regional Director excluded the ballots of James Herlihy, William Stephenson, and Heather Lewis because they were clearly hired by Wynn on May 1, 2015 and were no longer employed by Labor Plus at the petitioned-for venue as of the date of the election. **Jt. Ex. 11** at 14-15; **Jt. Ex. 14** at 10.

Significantly, any confusion about Mr. Weigant's hire date by Wynn and the fact that Labor Plus no longer referred him as a Labor Plus stagehand employee to the Encore Theater was resolved at the hearing before the Administrative Law Judge by virtue of the parties' Joint

Motion and Stipulation of Facts (Jt. Ex. 20), Ms. Taratko's testimony, and the documentary evidence. Specifically, the parties jointly stipulated that Wynn hired Mr. Weigant on May 1, 2015, the day before the representation election. **Jt. Ex. 20** at ¶ 25. Ms. Taratko testified that, once Wynn hired the former Labor Plus employees, Labor Plus did not assign the stagehands to work at the Encore Theater or provide any payroll services for those stagehands. Taratko 79:14-20; 80:14-21. Based on the testimony and documentary evidence presented at the hearing, the Administrative Law Judge ultimately and correctly found that the "record shows that the stagehands hired by Wynn on May 1 were never referred by Labor Plus to work at the Encore Theater after they were hired by Wynn. Thus, they were not employed by Labor Plus in the unit as of the election date, and Labor Plus never had an obligation to bargain with the Union over the terms of employment of those workers." Administrative Law Judge's Decision at 9-10, n.30; **GC Ex. 21**(d)-(j); **Jt. Ex. 11**. "Indeed, the evidence shows that Weigant did not work for Labor Plus at the Encore Theater at any time from April 28 until Labor Plus stopped referring stagehands on May 9." Id. at 10, n.34; **GC Ex. 21**. Consequently, the Administrative Law Judge properly ruled that Mr. Weigant should not be counted toward a successorship majority. Id. at 10.

D. The Union's Failure to Respond to Wynn.

On June 26, 2015, the Union sent a letter to Wynn requesting information and a request to bargain. **Jt. Ex. 12**; **Jt. Ex. 20** at ¶ 12. On July 2, 2015, Wynn responded by requesting the Union provide it with its factual and legal basis for its contention that Wynn was a joint or successor employer. **Jt. Ex. 13**; **Jt. Ex. 20** at ¶ 15. The Union did not respond to Wynn's July 2, 2015 letter. Despite its own failure to respond to Wynn's July 2, 2015 letter and to provide any legally cognizable basis requiring Wynn to bargain with it, the Union argues that Wynn's responsive letter "shows a clear decision on behalf of the employer to provide no further

information to the Union and to deny its obligation to bargain." See Charging Party's Brief at 4-5. Nevertheless, the Administrative Law Judge found that "neither the evidence introduced at trial nor the stipulation of facts definitively shows" that Wynn did not provide the requested information. Administrative Law Judge's Decision at 5, n.19. Due to the Administrative Law Judge's findings, he did not ultimately reach the issue of whether Wynn was obligated to and failed to provide the requested information to the Union. Id.

III. LEGAL ARGUMENT.

A. Wynn Did Not Inherent a Successor Employer Bargaining Obligation from Labor Plus and the Administrative Law Judge Properly Excluded Mr. Weigant.

Over the years, the U.S. Supreme Court has established when a new employer becomes a successor employer with an obligation to bargain with the representative of the predecessor employer's employees. See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 36 (1987); Howard Johnson Co. v. Detroit Local Joint Exec. Board, 417 U.S. 249, 261-64 (1974); NLRB v. Burns Int'l. Sec. Servs., Inc., 406 U.S. 272, 293 (1972). In determining whether an employer has become a successor, the trier of fact may assess among other factors:

> [Whether] there has been a substantial continuity of the same business operations[;] [whether] the new employer uses the same plant; [whether] the same or substantially the same work force is employed; [whether] the same jobs exist under the same working conditions; [whether] the same supervisors are employed; [whether] the same machinery, equipment, and methods of production are used; and [whether] the same product is manufactured or the same service [is] offered.

Resilient Floor Covering Pension Trust Fund Bd. of Trs. v. Michael's Floor Covering, Inc., 801 F.3d 1079, 1090–91 (9th Cir. 2015) [internal citations omitted].

Notably, however, in the collective bargaining context, the overriding condition for imposing a successor employer bargaining obligation is whether the alleged successor employer hires a majority of its employees from the predecessor employer. See Fall River Dyeing, 482

U.S. at 41, 46 (noting that the "triggering" fact for the bargaining obligation is composition of the successor's work force); Howard Johnson Co., 417 U.S. at 261-64 (holding that an employer is not obligated to hire the workforce of its predecessor, and that by not hiring the majority of its workforce from the predecessor employer, there is no substantial continuity of identity in the workforce); Burns, 406 U.S. at 278-279 (holding that the successor employer had an obligation to bargain with the union because a majority of its employees had been employed by the predecessor employer). Indeed, only if the new employer makes a conscious decision to maintain generally the same business and hires a majority of its employees from the predecessor, is the bargaining obligation of § 8(a)(5) then activated. Fall River Dyeing, 482 U.S. at 41. "On the other hand, when the successor employer has never employed in the unit a majority of its workers who are former employees of the predecessor, there is no duty to bargain." Pac. Hide & Fur Depot, Inc. v. NLRB, 553 F.2d 609, 611 (9th Cir. 1977).

Here, the Administrative Law Judge properly held that Wynn did not inherent a bargaining obligation because it never hired a majority of Labor Plus employees for its employee complement. As a threshold matter, unlike the standard business transactions that create a successor employer status, *i.e.*, asset or stock purchases, mergers, acquisitions, etc., the present matter involved a contracted third-party vendor (Labor Plus) that provided workers for Wynn for a limited engagement. Prior to any representation election or the Certification of Representative in which Labor Plus was identified as the sole employer, Wynn notified Labor Plus that it was terminating the Agreement for Services. Wynn then openly recruited its own stage technicians to work for the ShowStoppers show, including requiring applicants to proceed through its standard application and background check processes. Some stagehands who had previously worked for Labor Plus and who applied for positions with Wynn were hired for the show; others were not

hired. Other employees who had not worked for Labor Plus were also hired by Wynn. All of the stage technicians hired by Wynn, regardless of whether or not they were previously associated with Labor Plus, had their wages, benefits, hours, and other terms and conditions of employment independently established by Wynn. Wynn neither explicitly nor implicitly agreed to adopt any bargaining obligation to be imposed on Labor Plus in the future as none existed when Wynn cancelled the services agreement and started hiring stage technicians directly.

In its exceptions, the Union pins its hope on reversing the Administrative Law Judge's well-reasoned finding that Mr. Weigant cannot be counted toward a successorship majority. The Union's efforts in that regard are misguided. Based on the documents, testimony, and, most importantly, the parties' Joint Motion and Stipulation of Facts[4] (Jt. Ex. 20) the record demonstrates that Mr. Weigant was hired by Wynn on May 1, 2015 (before the representation election) and was not referred by Labor Plus to work in the Encore Theater any time from April 28, 2015 until Labor Plus stopped referring stagehands to the Encore Theater on May 9, 2015. Administrative Law Judge Decision at 10, n.34; **GC Ex. 21**; **Jt. Ex. 20** at ¶ 25. The Union does not challenge the Administrative Law Judge's decision to exclude Mr. Herlihy, Mr. Stephenson, Ms. Lewis, or Mr. Jonathan Contini – all of whom Wynn hired on May 1, 2015 – from being counted toward a successorship majority.

In that regard, Mr. Weigant is the same as the three other stagehand technicians[5] that the hearing officer for Labor Plus's ballot challenges and election objections held were not eligible

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[4]"Stipulations of facts voluntarily entered into by the parties are binding on both trial and appellate courts." See Administrative Law Judge's Decision at 10, n.33 (citing FDIC v. St. Paul Fire & Marine Ins. Co., 942 F.2d 1032, 1038 (6th Cir. 1991); Vallejos v. C. E. Glass Co., 583 F.2d 507, 510 (10th Cir. 1978) ("As a general rule, a stipulation is a judicial admission binding on the parties making it, absent special considerations.")).

[5]The three employees were Mr. Herlihy, Mr. Stephenson, and Ms. Lewis. Mr. Contini did not cast a ballot. **Jt. Ex. 11** at 13, n.8.

to vote in the representation election because they were already employed by Wynn prior to the May 2, 2015 election. That ruling and the stipulated facts alone make a finding of majority status in favor of the Union impossible. As set forth by the Administrative Law Judge, the record clearly "shows that the stagehands hired by Wynn on May 1 [including Mr. Weigant] were never referred by Labor Plus to work at the Encore Theater after they were hired by Wynn. Thus, they were not employed by Labor Plus in the unit as of the election date, and Labor Plus never had an obligation to bargain with the Union over the terms of employment of those workers. Id. at 9-10, n.30. Accordingly, the Administrative Law Judge properly excluded Mr. Weigant, along with Mr. Herlihy, Mr. Stephenson, Ms. Lewis, and Mr. Contini from being counted toward a successorship majority and that finding should not be disturbed. Moreover, as no successor employer bargaining obligation can be foisted on Wynn because it never maintained a majority of Labor Plus employees in its Encore Theater complement of stage technicians, the Administrative Law Judge correctly dismissed the Amended Consolidated Complaint and that ruling should be affirmed by the Board.

B. The Union and General Counsel Failed to Prove that Wynn Failed to Provide Information.

In the event the Board finds a successor bargaining obligation despite the lack of majority status and the deprivation of Wynn's due process rights, Wynn has not committed an unfair labor practice with respect to the Union's request for information and request to bargain. As set forth *supra*, if a majority of the employees in the successor's employee complement were part of the collective bargaining unit before the transfer, there is a duty to bargain. Pac. Hide & Fur Depot, Inc., 553 F.2d at 611. Nevertheless, a successor is under no obligation to hire employees of a predecessor and is free to set the initial terms of employment for those employees should it

decide to hire them.[6] Burns, 406 U.S. at 294. Once majority status has been established, the position of the successor is "akin to that of an employer confronted with a newly selected bargaining representative. It [is] not free thereafter to establish or change conditions of employment for unit employees without bargaining with the Union." Ranch-Way, Inc., 203 N.L.R.B. 911, 913 (1973).

In the present case, there has never been a finding of majority status because it simply does not exist. Regardless, even if by some contrived method majority status is found, the Union and the General Counsel failed to put forth sufficient hearing at the hearing before the Administrative Law Judge to establish that Wynn engaged in an unfair labor practice. See Administrative Law Judge's Decision at 5, n.19. This is not a case where a union's request for information has been wholly ignored by an employer or met with an immediate denial. Instead, Wynn responded to the Union's June 26, 2015 request by letter of July 2, 2015. However, the Union then failed to respond to Wynn's inquiry or to provide necessary information about its status as the asserted collective bargaining representative of the employees. Consequently, the Union – not Wynn – failed to engage in the good faith exchange of information by wholly disregarding Wynn's responsive inquiry. Such bad faith by the Union is magnified by the fact

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[6]The U.S. Supreme Court in Burns recognized an exception to this rule for "perfectly clear" successors. However, neither the General Counsel nor the Union established through the witness testimony or other evidence that Wynn is a "perfectly clear" successor of Labor Plus. Indeed, such an assertion is contradicted by the established facts that, while Labor Plus stagehands were merely told they could apply for open position with Wynn if they were interested, Wynn posted the positions on its website, hired from other sources, required all employees to proceed through its application, background, and drug testing processes, and made all hired employees subject to its terms and conditions of employment. No intent to hire all of the Labor Plus stagehands, to adopt a collective bargaining agreement, or to negotiate with the Union was ever expressed by Wynn, and could not have been due to the fact that Wynn was not timely apprised of the representation election or its results when it notified Labor Plus of the termination of the services agreement and began to hire stage technicians. Thus, Wynn was privileged unilaterally to set the initial terms on which it would hire employees for its operation and, by so doing, Wynn did not violate Section 8(a)(5) and (1) of the Act.

that the Union purposefully excluded Wynn from participation in any of the representation proceedings with the intent to belatedly assert a bargaining obligation on Wynn. As a result, the General Counsel and Union failed to establish the commission of any unfair labor practice by Wynn.

IV. CONCLUSION.

For the aforementioned reasons, the Board should deny the Charging Party's exceptions and should affirm the Administrative Law Judge's rulings, findings, and conclusions and adopt the recommended order.

DATED this 30th day of March, 2017.

Respectfully submitted,

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I hereby certify that on March 30, 2017, I did serve a copy of **Respondent Wynn Las Vegas, LLC's Answering Brief to the Charging Party's Exceptions to the Administrative Law Judge's Decision** upon:

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